



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)
c/o Attorney John Wargo
431 Main St
Racine, WI 53403

DECISION

MDV-51/43751

PRELIMINARY RECITALS

Pursuant to a petition filed March 7, 2000, under Wis. Stats. §49.45(5) and Wis. Adm. Code §SHA 3.03(1), to review a decision by the Racine County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on April 10, 2000, at Racine, Wisconsin.

The issue for determination is whether the county agency correctly determined that the Petitioner's transfer of assets to a private annuity was a disqualifying divestment for the purposes of institutional MA eligibility.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)
c/o Attorney John Wargo
431 Main St.
Racine, WI 53403

Representative:

Attorney John Wargo
431 Main St.
Racine, WI 53403

State Agency:

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Jose Carabal, ESS
Racine County Dept Of Human Services
1717 Taylor Ave. (use DWD Left
Racine, WI 53403-2497

Administrative Law Judge:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. The Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a 98-year-old (DOB 6-8-02) resident of Racine County.
2. On January 7, 2000 an application for institutional MA was filed on behalf of the Petitioner. This application was denied by the county agency because the county agency determined that the Petitioner had divested assets. The period of ineligibility

was determined by the county agency to be 27 months, ending March 31, 2000. This followed DHFS's Bureau of Welfare Initiatives Operations Memo, # 99-19 (issued 3-17-99). The Memo informed MA eligibility workers that balloon annuities were to be considered to be divestments.

3. On or about January 29, 1998 the Petitioner transferred \$ 102,388.20 to her Power of Attorney, (POA). He signed a document entitled "Wealth Protector Note". Exhibit 2. The Wealth Protector Note is an irrevocable annuity. See Exhibit # 5.
4. The Wealth Protector Note states that (POA) agrees to pay the holder (the Petitioner) monthly interest payments in the amount of \$ 767.78 beginning April 1, 1998 with successive interest payments due on the first of each month. No principal payment is required by the note until May 31, 2002 at which time payment of the entire principal balance must be made. All interest and principal payments are canceled in the event of the Petitioner's death. The interest rate on the note is 6 % per annum plus a 3% premium per annum. The document was drafted by Atty. John J. Wargo.

DISCUSSION

I. Relevant Law and Policy

A divestment occurs when an institutionalized individual, his spouse, or another person acting on his behalf, transfers assets for less than fair market value, on or after the individual's "look-back date." *Wis. Stats. § 49.453(2)(a)*. The "look-back date" is defined as 36 months before, or with respect to trusts, 60 months before, the first date the individual is both institutionalized and an MA applicant. *Ibid.*, (1)(f). If such a transfer occurs, the individual is ineligible for MA for nursing home services for a number of months determined by totaling the value of all assets transferred during the look-back period and dividing that amount by the average monthly cost to a private patient of nursing facility services at the time of the MA application. *Ibid.*, (3)(b). The ineligibility period begins with the month of the first divesting transfer of assets. *Ibid.*, (3)(a).

The Wisconsin Statutes, at § 49.453(4), specifically address the divestment of assets to irrevocable annuities:

(4) IRREVOCABLE ANNUITIES. (a) For the purposes of sub. (2), whenever a covered individual or his or her spouse, or another person acting on behalf of the covered individual or his or her spouse, transfers assets to an irrevocable annuity ***in an amount that exceeds the expected value of the benefit***, the covered individual or his or her spouse ***transfers assets for less than fair market value***.

(b) *The amount of assets that is transferred for less than fair market value under par. (a) is the amount by which the transferred amount exceeds the expected value of the benefit.*

(c) The department shall promulgate rules specifying the method to be used in calculating the expected value of the benefit, based on 26 CFR 1.72-1 to 1.72-18, and specifying the criteria for adjusting the expected value of the benefit based on a medical condition diagnosed by a physician before the assets were transferred to the annuity.

(emphasis added)

"Annuity" is not defined in the statutes. However, *Wis. Stats. § 49.453(1)(c)* defines "expected value of the benefit" as follows:

(c) "Expected value of the benefit" means the amount that an irrevocable annuity will pay to the annuitant during his or her expected lifetime as determined under sub. (4) (c).

The *Wisconsin Administrative Code § HFS 103.065(4)(a)* defines "divestment" as follows:

(4) DIVESTMENT. (a) Divestment resulting in ineligibility. An institutionalized individual or someone acting on behalf of that individual **who disposes of resources at less than fair market value** within 30 months immediately before or at any time after the individual becomes institutionalized if the individual is receiving MA on the date he or she becomes institutionalized or, if the individual is not receiving MA on that date, within 30 months immediately before or at any time after the date the individual applies for MA while institutionalized, shall be determined to have divested. (emphasis added)

The divestment of assets to an irrevocable annuity is treated as follows at *Wis. Admin. Code § HFS 103.065(4)(at)*:

(at) Transfer of resources to an irrevocable annuity on or after October 1, 1993. 1. Whenever an institutionalized individual or his or her spouse, or another person acting on behalf of the institutionalized individual or his or her spouse, **transfers funds** on or after October 1, 1993, **to an irrevocable annuity in an amount that exceeds the expected value of the benefit**, the institutionalized individual or his or her spouse shall be determined to have divested. (emphasis added)

“Annuity” under the code is defined at *Wis. Admin. Code §HFS 103.065(3)(a)* as follows:

(a) “Annuity” means a written contract under which, in return for payment of a premium or premiums, an individual or individuals have the right to receive fixed, periodic payments for life or up to a fixed point in time

“Expected value of the benefit” is defined

(c) “Expected value of the benefit” means the amount that an irrevocable annuity will pay to a primary annuitant or to joint annuitants during his or her expected lifetime.

Finally, the *MA Handbook*, drafted by the Department pursuant to *Wis. Stats. § 49.45(34)* to assist county economic support workers, who administer the medical assistance program, defines “divestment” as follows:

“Divestment” is the transfer of income, non-exempt assets, and homestead property, which belong to an institutionalized person or his/her spouse or both:

1. For less than the fair market value of the income or asset
2. By an institutionalized person

MA Handbook, Appendix 14.2.1.

The *MA Handbook*, at *Appendix 14.2.6*, defines “fair market value” as an estimate of the prevailing price an asset would have had it been sold on the open market at the time of the transfer.

II. Did the Petitioner Divest Assets

The Petitioner's attorney urges adoption of the rationale of a Washington County Circuit Court in a case similar to the instant case. In that case the Court concluded that the particular annuity transaction of that case was not a divestment because the amount transferred did not exceed the value of the benefit and because that Court concluded that *OPS Memo 99-19* was an improperly promulgated rule and, therefore, is to be given no effect.

I decline to adopt the argument advanced by the Petitioner's attorney for the following reasons.

First, the decision of the Washington County Court is not precedential and I am not bound to follow it.

Second, the life expectancy of the Petitioner at the time of the execution of the annuity involved here was four years per the *MA Handbook* life expectancy table. This table is based on Federal

Regulations found at 26 CFR 1.72-9, Table 1. See *MA Handbook, Appendix 30.10.0*. The term of the instant Wealth Protector Note is slightly in excess of 51 months (January 29, 1998 through May 31, 2002). The Petitioner's representative indicates that he followed a State of Wisconsin mortality table. This mortality table was not offered into the record and I am not willing to adopt it here as the applicable life expectancy table. The instant Wealth Protector Note does not fit within the parameters of §HFS 103.065(4)(at), *Wis. Admin. Code*.

Third, even if the instant Wealth Protector Note met the requirements of HFS § 103.065(4)(at), *Wis. Admin. Code*, to conclude that the instant transfer is not a divestment assumes that this is a transaction had a fair market basis. Basic to the definition of divestment is that the transfer is for less than fair market value. What has really happened here is that the Petitioner has given her POA \$ 102,388.20 with no return. In argument made at the hearing it was conceded that the Petitioner forgives the interest payments. Whether the forgiveness of the interest payments is by the act of accepting and returning the payment or declining it in the first place is not relevant, the fact is that the Petitioner is receiving nothing here. No arms-length trader would ever agree to such an arrangement. While the Petitioner's representative would have the Division of Hearings and Appeals look at the legal document involved, it is more appropriate to look at the substance. On May 31, 2002, when the \$ 102,388.20 lump sum payment is due, the Petitioner will be 99 years, 11 months old. I fail to see how any objective reviewer could find that this transaction benefits the Petitioner in any way nor has any evidence been offer to indicate a benefit to her. The transaction is simply a means of diverting the Petitioner's assets to benefit someone else at the expense of public assistance. The transfer involved here is a divestment.

Finally, the issue of balloon annuities has been addressed in two Division of Hearings and Appeals Proposed Decisions that have been issued as Final Decisions by the Dept. of Health and Family Services. See *Division of Hearings and Appeals Decision #s MDV-30/35331 & MDV-30/35213, both issued December 17, 1998*. In both, the Secretary of the DHFS decided that if an annuity transaction has no legitimate underlying economic substance, it is a camouflage for securing MA eligibility. The Division of Hearings and Appeals is bound by these decisions.

CONCLUSIONS OF LAW

That the Petitioner divested property because she did not receive fair market value in giving that property to her POA in exchange for interest payments that are forgiven and a promise to repay the principal just before the end of her life expectancy.

NOW, THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in § 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in § 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this _____
day of _____, 2001.

David D. Fleming
Administrative Law Judge
Division of Hearings and Appeals
5-31/DDF

cc: RACINE COUNTY DEPT OF HUMAN SERVICES
DHFS - Susan Wood